

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION**

SYLVESTER O. BARBEE, ADC #131311

PLAINTIFF

v.

NO. 5:14CV00265 JLH/HDY

CHERI ELLIS, U.S. Dept. of Agriculture
Inspector; AUNDREA WEEKLY, Safety and
Sanitation Officer, Cummins Unit; DR. MOORE,
Physician of CMS, Cummins Unit;
MARIE E. AUSTIN, Health Service Administrator
of CMS, Cummins Unit; JASON BOYD,
Poultry/Swine Inspector of Egg Process Room,
Cummins Unit; JOHN DOE, Hen House Sanitation
Inspector 2012, Cummins Unit; and
ANGELIKA SMARJESSI, Food Preparation
and Service Manager, Cummins Unit

DEFENDANTS

ORDER

Sylvester O. Barbee, an inmate at the Ouachita River Unit of the Arkansas Department of Correction, brings this action pursuant to 42 U.S.C. § 1983, alleging that he contracted salmonella in August of 2012 when he consumed colonized eggs that had been produced at the Cummins Unit Poultry Operation. United States Magistrate Judge H. David Young, in screening the complaint pursuant to 25 U.S.C. § 1915A, has recommended that the complaint be dismissed as to Cheri Ellis, a U.S.D.A. inspector, and Jason Boyd, a poultry and swine inspector, but allowed to go forward against the other defendants, all of whom are employed by the Arkansas Department of Correction. The ADC defendants object to the recommendation that the action be allowed to go forward as to them, while Barbee objects to the recommendation that Ellis and Boyd be dismissed.

The ADC defendants contend that Barbee has not exhausted his administrative remedies and, therefore, Magistrate Judge Young erred in recommending that the action be allowed to go forward as to them. Failure to exhaust administrative remedies, however, is an affirmative defense that must be pled and proven by the defendants. *Jones v. Bock*, 549 U.S. 199, 127 S. Ct. 910, 166 L. Ed. 2d

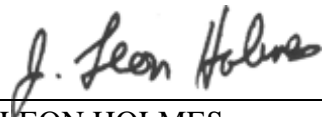
798 (2007). The ADC defendants have not yet answered and raised the affirmative defense of failure to exhaust. Their objections are therefore overruled without prejudice to their right to file a subsequent motion for summary judgment based on the affirmative defense of failure to exhaust the administrative remedies.

Magistrate Judge Young recommended that Ellis and Boyd be dismissed because the complaint only alleged that they failed to document deficiencies in processing eggs when they investigated the salmonella outbreak and therefore had no role in the events until after the outbreak. Barbee contends that his complaint, liberally construed, alleges that the actions of Ellis and Boyd at least in part caused the outbreak. The complaint is ambiguous on this point. Liberally construing the complaint for screening purposes, the Court agrees with Barbee that it can be construed to allege that Ellis and Boyd at least in part caused the salmonella outbreak. Therefore, the Court declines to adopt the recommendation that Barbee's claims against them be dismissed.

For the reasons stated, the recommended disposition (Document #4) is adopted with respect to the recommendation that the suit go forward against the ADC defendants but not adopted with respect to the recommendation that Cheri Ellis and Jason Boyd be dismissed.

Liberally construing Barbee's complaint, he has, for screening purposes, stated a claim for relief against Cheri Ellis and Jason Boyd. The United States Marshal is directed to serve a copy of the complaint (Document #2), this Order, and summons, upon Ellis and Boyd without prepayment of fees and costs or security therefore.

IT IS SO ORDERED this 31st day of July, 2014.



J. LEON HOLMES
UNITED STATES DISTRICT JUDGE